NO. 44101-2-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

TED SPICE, et al., Plaintiff /Petitioner,

v.

ESTATE OF DORIS E. MATHEWS, deceased; DONNA E. DUBOIS, as personal representative; DONNA E. DUBOIS & her marital community, individually, et al, Defendants/Respondents.

RESPONDENTS' BRIEF

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PM 6/1/15

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III. STATEMENT OF THE CASE

The relevant facts are set forth in the argument section in Paragraph IV herein.

IV. ARGUMENT

A. Appellant has failed to properly assign error to the trial court's findings of facts and conclusions of law.

RAP 10.4(c) provides as follows: "*If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.*" Appellant challenges the trial court's findings of fact and conclusions of law re: attorney fees, but makes no attempt to comply with RAP 10.4 (c). Appellant neither quotes nor appends the trial court's findings for which he seeks review. In the absence of a clear challenge to those findings, the trial court's findings will be deemed verities on appeal. *In re Estate of Palmer*, 145 Wn. App. 249, 265, 187 P.3d 758 (2008).

B. The trial court did not err in denying appellant's request for attorney's fees.

1. Appellant did not prevail on his complaint for damages under the promissory note.

Appellant sought recovery for damages for alleged breach of the January 8, 2004, promissory note.[1] In order to be entitled to an award of attorney fees on the promissory note, RCWA 4.84.330 requires appellant be the "*prevailing party*" on that claim. The "*prevailing party*" means the party in whose favor the court rendered final judgment. RCW 4.84.330; *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011). The trial court did not enter final judgment for plaintiff on the promissory note.[2] Nor did the jury did award appellant any damages on the promissory note.[3] Appellant is therefore not the "*prevailing party*" on the promissory note. Appellant's argument for attorney fees on the promissory note therefore fails.

The trial court found that respondents were the prevailing parties for purposes of this action in that the jury awarded well over 50 percent of the real property in dispute to the Estate of Doris E. Mathews.[4] At the time he filed suit and when the trial started, appellant held deeds with his name as sole owner of virtually all the parcels of property. The jury

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[1] CP 1-13.
[2] CP 1156-61.
[3] CP 937-40.
[4] CP 1225.

dismantled most of that and awarded most of the parcel titles to the Estate.[5] The trial court therefore properly found respondents to be the prevailing parties.

Appellant argues that he overcame 16 affirmative defenses.[6] Appellant fails to cite any authority to support his argument, so his argument should not be considered. RAP 10.3(a) (6); *West v. Thurston Cnty.*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012), *review denied, W. v. Washington Ass'n of Cities*, 176 Wn.2d 1012, 297 P.3d 709 (2013). Appellant fails to acknowledge that 12 of respondents' affirmative defenses were plead as defenses to the promissory note.[7] Appellant fails to explain how he overcame those 12 defenses when the jury awarded him nothing on his $8,000,000 promissory note. Appellant's argument should therefore be rejected. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("*Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.*").

Other affirmative defenses addressed appellant's breaches of duties outside the promissory note: paragraph 6.4 (appellant's breach of duty of candor to disclose his use of business money, property transfers, and

[5] CP 939-40.
[6] Appellant's Brief p. 14.
[7] CP 1973-74.

appropriation of corporate opportunities)[8]; paragraph 6.5 (appellant's negligent misrepresentation in connection with plans to develop a warehouse or other business building)[9]; paragraph 6.9 (appellant's comparative fault)[10]; paragraph 6.16 (appellant concealed his actions, thereby preventing commencement of the statute of limitations)[11]; paragraph 6.18 (invalidity of deeds).[12]

None of those affirmative defenses support an award of attorney fees under the attorney fee clause in the promissory note. If the tortious breach of a duty, rather than a breach of a contract, gives rise to the cause of action, the claim is *not* properly characterized as breach of contract. Boguch v. Landover Corp., 153 Wn. App. 595, 616, 224 P.3d 795 (2009).

Appellant also argues he successfully defended 24 of 25 of respondents' counterclaims.[13] Appellant fails to acknowledge 14 of respondents' counterclaims were tort claims for which attorney fees are not awarded.[14] Respondents' tort claims were predicated upon appellant's breaches of duty independent of the promissory note. Therefore, those

[8] CP 1973.
[9] CP 1973.
[10] CP 1974.
[11] CP1974.
[12] CP 1974.
[13] Appellant's Brief p. 14.
[14] CP 1981-92, 97-2000, 2001.

tort claims cannot be characterized as "on the contract" for purposes of an award of attorney fees. Boguch, 153 Wn. App., 616.

Allowing recovery of fees for tort claims which do not authorize attorney fees would also give the prevailing party an unfair and unbargained for benefit. *C-C Bottlers, Ltd. v. J.M. Leasing, Inc.*, 78 Wn. App. 384, 387-88, 896 P.2d 1309 (1995); *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987).

Respondents' Counterclaims II and XXVI for conversion[15] do not support an award of attorney fees. *Michel v. Melgren*, 70 Wn. App. 373, 380, 853 P.2d 940 (1993). In addition, Counterclaims II and XXVI involve breaches of duty outside the promissory note and will not support an award of attorney fees under the attorney fee clause in the promissory note. *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

Respondents' Counterclaim IV for unjust enrichment[16] does not support an award of attorney fees under the promissory note. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 578, 161 P.3d 473 (2007).

Respondents' Counterclaims V (fraud)[17], VI (fraud)[18] and VII (fraudulent concealment)[19] are permissive counterclaims. *C-C Bottlers,*

[15] CP 1982.
[16] CP 1985.
[17] CP 1982-85.
[18] CP 1985-89.
[19] CP 1989-90.

Ltd. v. J.M. Leasing, Inc., 78 Wn. App. 387-88. The attorney fee clause in the promissory note does not authorize attorney fees incurred in defending such fraud claims. *Norris v. Church & Co., Inc.*, 115 Wn. App. 511, 517, 63 P.3d 153, *review denied*, 146 Wn.2d 1021, 52 P.3d 520 (2002)(Suit for fraud was not "on the contract"; attorney fees denied); *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 702, 106 P.3d 258 (2005)(Fraudulent concealment sounds in tort, not contract; prevailing party was not entitled to attorney fees).[20]

Respondents' Counterclaims VIII (rescission of contract)[21], IX (breach of contract)[22], X (failure of assent)[23], XI (procedural unconscionability)[24], XII (substantive unconscionability)[25] were directed against the promissory note, on which appellant was awarded nothing. Therefore, appellant did not "*prevail*" on those five counterclaims. Hawkins, 166 Wn. App., 10.

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[20] Hill, 110 Wn. App. 394 is not controlling here. In Hill, 110 Wn. App. 394, the statutory tort claim in that case would not have arisen but for the parties' contract in that case. Hill, 110 Wn. App. at 394-12. Here, in contrast, respondent's fraud claims have nothing to do with the promissory note. *Hill* is therefore distinguishable from the facts of this case.

[21] CP 1893.

[22] CP 1893-94.

[23] CP 1894-95.

[24] CP 1895.

[25] CP 1896-97.

Respondents' Counterclaims XIII (undue influence)[26], XIV (breach of fiduciary duties)[27] and XV (accounting)[28] involve breaches of duty by appellant apart from the promissory note. Therefore, Counterclaims XIII, XIV, XV are not "on the contract" and will not support an award of attorney fees under the attorney fee clause promissory note.[29] *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

Respondents' Counterclaims XVI (negligent misrepresentation)[30], XVII (negligence)[31], XVIII (negligence)[32], XIX (negligence)[33] and XX (negligence)[34] involved breaches of common law duties, and not a breach of any provision of the promissory note. Counterclaims XVI, XVII, XVIII, XIX and XX are therefore not "on the contract" and will not support an award of attorney fees under the attorney fee clause in the promissory note. *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

Respondents' Counterclaim XX1 for quiet title[35] does not support an award of attorney fees. *Colwell v. Etzell*, 119 Wn. App. 432, 442, 81 P.3d 895 (2003); *Magart v. Fierce*, 35 Wn. App. 264, 268, 666 P.2d 386

[26] CP 1897-2000.
[27] CP 2000.
[28] CP 2001
[29] CP 2002-03.
[30] CP 2003-04.
[31] CP 2004.
[32] CP 2005.
[33] CP 2006.
[34] CP 2006-07.
[35] CP 2007-08.

(1983). In addition, Counterclaim XXI involves breaches of duty outside the promissory note and will not support an award of attorney fees under the attorney fee clause in the promissory note. *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

Respondents' Counterclaim XXII for declaratory judgment[36] does not support an award of attorney fees. *Wagers v. Goodwin*, 92 Wn. App. 876, 884, 964 P.2d 1214 (1998); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 777, 871 P.2d 1050 (1994). In addition, Counterclaim XXII involves breaches of duty outside the promissory note and will not support an award of attorney fees under the attorney fee clause in the promissory note. *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

Respondents' Counterclaims XXIII (disregard of corporate existence)[37], XXIV (judicial dissolution of limited liability company)[38] and XXV (estoppel to assert statute of limitations)[39] involve duties outside the promissory note, and therefore do not support an award of attorney fees under the attorney fee clause in the promissory note. *Boguch v. Landover Corp.,* 153 Wn. App. 615 ("*If a party alleges breach of a duty imposed by an external source, such as a statute or the common law, the party does not bring an action on the contract, even if the duty*

[36] CP 2008-09.
[37] CP 2009-10.
[38] CP 2010.
[39] CP 2011.

would not exist in the absence of a contractual relationship.(Citations omitted).").

Appellant also fails to consider his obligation to segregate attorney fees on claims to which he is entitled from time spent on claims that do not support an attorney fee award. *Boguch v. Landover Corp.,* 153 Wn. App. 619-20. None of the attorney fee declarations of appellant's counsel submitted in the trial court reveal any effort to segregate time spent on successful claims from unsuccessful claims.[40]

2. Appellant is not entitled to recover attorney fees under the Plexus Investments, LLC, Operating Agreement.

Appellant argues that the Plexus Operating Agreement authorizes attorney fees and costs.[41] Appellant never alleged a claim upon the operating agreement. Appellant's amended complaint seeks recovery on the promissory note and on various tort claims.[42] Appellant's amended complaint did not allege a claim based upon the operating agreement. Neither the verdict form nor the trial court's judgment make any mention of the operating agreement.[43]

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[40] Rebecca Weiss CP 1113-16; Thomas Dickson CP 994-1042; Stephen Hansen CP 1051-1112; Brian Kirkorian CP 1117-50.
[41] Appellants Brief p. 15.
[42] CP 116-33.
[43] CP .

RCWA 4.84.330 is inapplicable here, as that statute authorizes an award of attorney fees "[*i*]*n any action on a contract*..." To constitute an action on a contract, for purposes of a contractual attorney fees provision, the action must arise out of the contract and be central to the dispute. *Tradewell Grp., Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993). *See also, Burns v. McClinton*, 135 Wn. App. 285, 310, 143 P.3d 630 (2006), as amended (Feb. 13, 2008), ("*The D & D partnership agreement was the background out of which the disputes arose, but it was not central to them. Because the claims in question were not brought to enforce the partnership agreement and the agreement was not central to the dispute, the trial court correctly concluded that the agreement does not provide a basis for awarding prevailing party attorney fees to Burns.*") Here, appellant's action was brought on the promissory note, and not on the operating agreement. Therefore, under *Tradewell* and *Burns,* appellant cannot establish that this action was one based upon the Plexus Operating Agreement for purposes of an award of attorney fees.

Even if the Plexus Operating Agreement were available to support appellant's attorney fee argument, all of the arguments presented above apply here to reject appellant's argument.

3. The trial court did not err in finding the attorney fee clauses in the promissory note and Plexus operating agreement unenforceable. Any such error was harmless.

Appellant argues attorney fee provisions in contract remain intact even if the contracts are deemed invalid.[44] In support, appellant cites *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-22, 63 P.3d 779 (2003), *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 196-97, 692 P.2d 867 (1984), *Yuan v. Chow*, 96 Wn. App. 909, 915-18, 982 P.2d 647 (1999), *Stryken v. Panell*, 66 Wn. App. 566, 832 P.2d 890 (1992), *Wallace v. Kuehner*, 111 Wn. App. 809, 46 P.3d 823 (2002) and *Singleton v. Frost*, 108 Wn.2d 723, 729, 742 P.2d 1224 (1987).[45]

Appellant misplaces reliance upon these cases. In *Mount Hood, Herzog, Yuan,* and *Stryken*, the defendant in an action for breach of contract was allowed attorney fees under the attorney fee provisions of the contract, despite the court having found the contract unenforceable. The operative rule in those cases is found in RCWA 4.84.330, in which the Legislature intended that unilateral attorney fees provisions be applied bilaterally. Neither RCWA 4.84.330, nor *Mount Hood,* nor

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[44] Appellant's Brief p. 16-17.
[45] *Ibid.*

Herzog, nor *Yuan,* nor *Stryken* support an award of attorney fees to an unsuccessful plaintiff such as appellant, who tried and failed to enforce a contract containing an attorney fee clause.

Wallace, 111 Wn. App. 809 also does not support appellant's argument. In *Wallace*, 111 Wn. App. 809, the evidence disclosed that the parties never intended a contract to be enforceable. *Wallace* does not support the request for attorney fees by an unsuccessful plaintiff such as appellant.

Singleton, 108 Wn.2d 723 is also distinguishable here. In *Singleton*, the court found error in the denial of attorney fees to a lender who successfully sued on a promissory note containing an attorney fee clause. *Singleton* does not support the request for attorney fees by an unsuccessful plaintiff such as appellant.

An error is harmless if it is not prejudicial to the substantial rights of the parties, and in no way affected the final outcome of the case. *Blaney v. Int'l Ass'n of Machinists And Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004) (*Quoting State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). Assuming, arguendo, the trial court erred in finding serious questions about the legality of promissory note and the Plexus Operating Agreement, any such error is harmless, as the jury had already denied appellant any recovery on the promissory

note. Therefore, appellant could not, under any circumstances, have been deemed a prevailing party under the attorney fee clause in promissory note. *Hawkins*, 166 Wn. App. 1

4. Appellant's argument for a proportional division of attorney fees is moot.

Appellant argues that he is entitled to an award of attorney fees under the proportionality analysis announced in *Marassi v. Lau*, 71 Wn. App. 912, 859 P.2d 605 (1993).[46] *Marassi* was followed in *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 130 P.3d 892 (2006).

The difficulty with appellant's argument is he fails to recognize he did not prevail on the promissory note, and therefore the attorney fee clause in that document is not available to him. Further, as noted above, the attorney fee clause in the Plexus Operating Agreement is not available to appellant, as the Agreement was not the contract under which appellant sought relief in his complaint. *See Burns*, 135 Wn. App., 310; *Tradewell Grp., Inc.*, 71 Wn. App., 130. Appellant therefore cannot be the prevailing party under RCWA 4.84.330, as he did not prevail under any contract.

An issue is moot if the court can no longer provide affective relief. *Brown v. Vail*, 169 Wn.2d 318, 337, 237 P.3d 263 (2010). As he cannot be a prevailing party under RCWA 4.84.330, the court cannot award

[46] Appellant's Brief p. 19-21.

appellant attorney fees under that statute, and his argument for a proportionality analysis in awarding attorney fees is therefore moot. Courts generally do not consider moot arguments. *State ex rel. Evans v. Amusement Ass'n of Wash., Inc.*, 7 Wn. App. 305, 307, 499 P.2d 906 (1972).

To the extent that it merits consideration here, appellant's argument for a proportionality analysis overlooks important differences between the *Marassi*, 71 Wn. App. 912 decision and the facts of this case. The plaintiffs in *Marassi* brought suit claiming multiple breaches of the same contract. The plaintiffs in *Marassi* recovered on only two of 12 of those claims. All 12 claims in *Marassi* were "on the contract" for purposes of attorney fees under RCW 4.84.330.

The holding in *Marassi* requires in order for the proportionality analysis to apply there must be at issue several distinct and severable breach of contract claims:

> In sum, we hold that ***when several distinct and severable breach of contract claims are at issue***, the defendant should be awarded attorney fees for those claims it successfully defends, and the plaintiff should be awarded attorney fees for the claims it prevails upon, and the awards should then be offset. (Emphasis added).

Marassi, 71 Wn. App., 918.

Here, appellant recovered nothing on the promissory note. Moreover, appellant's complaint alleged one claim for breach of the promissory note, the Estate's rejection of appellant's probate claim on the promissory note.[47] Thus, appellant cannot meet *Marassi's* requirement of "*several distinct and severable breach of contract claims...*"

Appellant claims to have prevailed against 24 of respondents' counterclaims, but as noted above, all but five of those counterclaims were not "on the contract" for purposes of attorney fees under RCWA 4.84.330. The other five counterclaims were directed against the promissory note on which appellant received nothing. Thus, the facts of this case do not support the proportionality analysis adopted in Marassi, 71 Wn. App. 912.

Transpac Dev., Inc., 132 Wn. App., 812 likewise involved litigation between the parties over several distinct and severable claims of breach of the same contract. In *Oh,* the plaintiff's claims for past and future rent and the defendant's counterclaims for premature termination of the parties' lease all arose out of that lease. 132 Wn. App. 215-16. The same cannot be said in this case for appellant's claims and respondents' counterclaims. Thus, while a proportionality analysis was appropriate in *Oh*, the necessary conditions for that analysis are not present here.

[47] CP 116-33.

Appellant also cites *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 115 P.3d 349 (2005).[48] In *Crest*, the court did not apply the proportionality analysis to award attorney fees to both parties. Instead, in a dispute over a construction contract, the court upheld the award to the defendant general contractor of 90 percent of the defendant's attorney fees and then offset that amount against the damages awarded to the plaintiff subcontractor. As in *Marassi* and *Oh*, and unlike this case, the claims of the contractor and the subcontractor arose out of the same construction contract. *Crest*, like *Marassi* and *Oh*, is distinguishable from the facts here.

5. Appellant's discussion of respondents' counterclaims fails to recognize appellant is not a prevailing party under RCWA 4.84.330**, and respondents' counterclaims and affirmative defenses do not support an award of attorney fees.**

At pages 21-31 of his brief, appellant engages in a pointless discussion of respondents' counterclaims and affirmative defenses. Once again appellant fails to recognize he did not prevail on the promissory note, and therefore the attorney fee clause in that document is not available to him. Further, the attorney fee clause in the Plexus Operating Agreement is not available to him, as the Agreement was not the contract under which appellant sought relief in his complaint. *See Burns*, 135 Wn. App., 310; *Tradewell Grp., Inc.*, 71 Wn. App., 130. Appellant therefore

[48] Appellant's Brief p. 20.

cannot be the prevailing party under RCWA 4.84.330, as he did not prevail under any contract.

Moreover, as noted above, respondents' tort counterclaims will not support an award of attorney fees in their own right, and because they involve breaches of duty outside the promissory note, they are therefore not "on the contract" for purposes of attorney fees under RCWA 4.84.330. *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

Moreover, as noted above, respondents' counterclaims for rescission of contract, breach of contract, failure of assent, procedural unconscionability and substantive unconscionability were directed against the promissory note, on which appellant was awarded nothing. Therefore, appellant did not "*prevail*" on those five counterclaims. *Hawkins v. Diel*, 166 Wn. App. 10.

Moreover, as noted above, respondents' counterclaim for unjust enrichment does not support an award of attorney fees under the promissory note. *Dragt v. Dragt/DeTray*, 139 Wn. App. 578.

Moreover, as noted above, respondents' counterclaims for undue influence, breach of fiduciary duties and accounting involve breaches of duty by appellant apart from the promissory note. Therefore, those counterclaims are not "on the contract" and will not support an award of

attorney fees under the attorney fee clause promissory note. *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

Appellant also fails to recognize respondents' affirmative defenses in paragraphs 6.4, 6.5, 6.9, 6.16, and 6.18 of respondents' counterclaim addressed appellant's breaches of duties outside the promissory note.[49] Therefore those affirmative defenses will not support an award of attorney fees under the attorney fee clause in the promissory note. *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

Appellant also fails to recognize 12 of respondents' affirmative defenses were plead as defenses to the promissory note.[50] Appellant fails to explain how he overcame those 12 defenses when the jury awarded him nothing on his $8,000,000 promissory note.

Appellant also claims to have prevailed by reason the jury's award to him of certain parcels or interests therein of real property at issue in this case.[51] Appellant fails to recognize the jury's award of real property to him had nothing to do with the promissory note. Appellant's claim to those parcels of real property stemmed from the deeds he claimed conveyed the property to him.[52] The jury dismantled most of appellant's purported deeds and awarded most of the parcel titles to the Estate of

[49] CP 1973-74.
[50] CP 1973-74.
[51] Appellant's Brief p. 31.
[52] EX 13A, 13B, 14A, 14B, 15A, 15B, 16, 17, 18.

Doris Mathews. Appellant's claims to those parcels of real property were no more "*on the contract*" for purposes of attorney fees than were respondents' counterclaims or affirmative defenses discussed above. Therefore, the jury's award to appellant of certain parcels and interests in real property does not qualify appellant as a prevailing party under either the attorney fee clause of the promissory note or RCWA 4.84.330. *Boguch v. Landover Corp.*, 153 Wn. App. 615-619.

6. Appellant is not entitled to reasonable attorney fees under the Lodestar Method.

Appellant did not prevail under RCW 4.84.330. Therefore he is not entitled to reasonable attorney fees under the Lodestar Method. Respondents incorporate the arguments and authorities in paragraphs IV B 1-5, above.

C. The trial court did not err in denying appellant's motion for judgment as a matter of law.

Appellant argues the trial court erred in denying his motion for judgment as a matter of law.[53] Appellant fails to indicate whether he made a motion for judgment as a matter of law before the case was submitted to the jury as required by CR 50(a). Without such a motion, the court will not review the trial court's denial of a CR 50(b) motion made after the verdict. "*To preserve the opportunity to renew a CR 50*

[53] Appellant's Brief p. 33-38.

motion after the verdict, a party must move for judgment as a matter of law before the trial court submits the case to the jury." *Gorman v. Pierce Cnty.*, 176 Wn. App. 63, 86, 307 P.3d 795 (2013) *review denied,* 179 Wn.2d 1010, 316 P.3d 495 (2014); *Hanks v. Grace*, 167 Wn. App. 542, 552-53, 273 P.3d 1029 (2012).

To the extent appellant's argument merits consideration here, the court reviews the trial court's order denying appellant's motion for judgment as a matter of law under the same standard as the trial court. *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208-8 (2009), as amended (Aug. 6, 2009). A motion for judgment as a matter of law may be granted only when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to support the verdict. Hawkins, 166 Wn. App., 13. Substantial evidence is evidence sufficient to persuade a fair-minded person that the premise is true. *Ibid.* The court must interpret the evidence against the moving party and in a light most favorable to the nonmoving party. *Faust*, 167 Wn. 2d 537-38. Overturning a jury verdict is appropriate only when the verdict is clearly unsupported by substantial evidence. *Ibid.* The court must defer to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the persuasiveness of evidence. *Faust*, 167 Wn. 2d 538.

The nonmoving party is not bound by the unfavorable portion of the evidence, but is entitled to have the case submitted to the jury on the basis of the evidence most favorable to his contention. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 322, 189 P.3d 178 (2008) *published with modifications at* 144 Wn. App. 1028 (2008).

One who challenges a judgment as a matter of law admits the truth of the opponent's evidence and all inferences which can reasonably be drawn from it. *Faust*, 167 Wn.2d, 537.

The first obstacle appellant must overcome in arguing error in the denial of his motion for judgment as a matter of law is the strong presumption that the jury verdict is correct. *Bunch v. King Cnty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005) ("*We strongly presume the jury's verdict is correct.*").

Appellant argues the evidence could not lead the jury to render its verdict awarding property in the percentages it did to appellant and respondents.[54] Appellant invites the court to inquire into the mental processes of the jurors. Washington courts will not inquire into the internal processes by which the jury reached its verdict. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204, 75 P.3d 944 (2003).

[54] Appellant's Brief p. 35-36.

Appellant argues, again without citation to authority, that there was no finding by the jury that the transfers were the result of fraud.[55] Appellant has failed to preserve this issue for review, as he fails to indicate whether he made a request for such a finding, or whether he objected to the failure by the trial court to require such a finding. Appellant is required "to *state distinctly the matter to which he objects and the grounds of his objection...*" CR 51(f). The requirements of CR 51(f) apply to the verdict form. *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994); *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 584, 187 P.3d 291 (2008); *Moore v. Harley-Davidson Motor Co. Grp., Inc.*, 158 Wn. App. 407, 417 n. 5, 241 P.3d 808 (2010).

The trial court, in denying appellant's motion for judgment as a matter of law, clearly found the evidence sufficient to support the jury's verdict:

> And I think there is more than adequate –more than adequate evidence for them to come up with the rulings they did. I don't see where they would have been wrong in finding that there was—that the operating agreements was a fraud, that any of the transfers were a fraud or misrepresented to her, or misrepresentation to her, that Mr. Spice may have taken more

[55] Appellant's Brief p. 34.

> cash and they offset that amount toward anything he might be claiming in the property.[56]

The evidence supports the verdict. Exhibits 14A and 14B purport to be quit claim deeds of the property at 11003 58th St. Ct. East in Puyallup from Doris Mathews to appellant. Exhibit 14A is dated December 1, 2007. Appellant prepared that deed.[57] That deed conveyed only a one-third interest to appellant. Exhibit 14B is dated June 9, 2009, and conveyed the remaining interest of Doris in the 11003 58th St. Ct. East to appellant. Exhibit 15A purports to be a quit claim deed, dated December 1, 2007, of the property at 5818 Milwaukee Ave in Puyallup from Doris Mathews to appellant. Each deed recites it was given "*in consideration of GIFT in hand paid...*" Appellant also held Doris Mathews' durable power of attorney.[58] Appellant testified that the power of attorney was dated February 28, 2004.[59]

As her attorney in fact, appellant stood in a fiduciary relationship to Doris Mathews. *In re Estate of Palmer*, 145 Wn. App., 264. An inter vivos gift to one in a fiduciary relationship with the donor is presumptively the result of undue influence, and casts upon the done fiduciary the burden of proving the absence of undue influence by clear,

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[56] RP 10/05/12 p. 12.
[57] RP 09/05/12 p. 257.
[58] EX 3.
[59] RP 8/30/12 p. 162.

cogent and convincing evidence. *Endicott v. Saul*, 142 Wn. App. 899, 922-25, 176 P.3d 560 (2008); *White v. White*, 33 Wn. App. 364, 371, 655 P.2d 1173 (1982). Appellant cannot meet this burden on the record in this case. Thus, the unrebutted presumption of undue influence that attaches to Exhibits 14A, 14B and 15A supports the jury's verdict.

The presumption of undue influence in *In re Estate of Palmer*, 145 Wn. App. 249, *Endicott* and *White* should extend to all those deeds containing a recitation of gift executed by Doris Mathews to Plexus, an entity controlled by appellant. Thus, Exhibit 13A, the quitclaim deed dated December 1, 2007, from Doris Mathews purportedly conveying the property at 11305 58th St. Ct. East in Puyallup to Plexus Investments is also burdened with the unrebutted presumption of undue influence, and thereby supports the jury's verdict.

The court may consider the foregoing argument regardless of whether it was raised in the trial court, as the court can affirm a trial court on any alternative basis supported by the record and pleadings, even if the trial court did not consider that alternative. *Eubanks v. Klickitat Cnty.*, 181 Wn. App. 615, 619, 326 P.3d 796, *review denied*, 181 Wn.2d 1012, 335 P.3d 940 (2014).

Direct evidence is not necessary to show fraud, but fraud may be inferred from circumstances. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385

P.2d 727 (1963). The record is replete with circumstances, or badges, supporting an inference of fraud. Doris Mathews met appellant on or about August 19, 2003.[60] At that time, Doris Mathews was 75 years old.[61] Appellant leased a duplex apartment from Doris Matthews' daughter and son-in-law on August 20, 2003.[62]

On September 19, 2003, just one month later, appellant opened a post office box in Sumner, a different town than Puyallup, though he resided in the duplex in close proximity to Doris Mathews.[63] Appellant was a signer on the post office box, but Doris Mathews was not.[64] Appellant received Doris' Matthews' business mail at the post office box, including her bank statements.[65] Appellant would from time to time take Doris Matthews's mail to her.[66] Appellant's action in relocating delivery of Doris Mathews' mail to the post office box altered her long-standing practice of receiving mail from her tenants at her Puyallup address.[67]

The central aspect of appellant's relationship with Doris Mathews was his plan regarding the development and construction of a warehouse or a commercial structure on Doris Mathews' property. Appellant

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[60] CP 1976.
[61] *Ibid.*
[62] RP 9/04/12 p. 281-82; EX 34.
[63] RP 9/04/12 p. 282-83; EX 35.
[64] RP 9/04/12 p. 283; EX 35
[65] RP 9/04/12 p. 283.
[66] RP 9/04/12 p. 284.
[67] RP 9/04/12 p. 285.

considered various developments for Doris' property 11003 58th St. Ct. East, a parcel approximately 3.84 acres in size, but settled on a retail office warehouse.[68] Appellant acquired a site plan for the project.[69] Very soon, appellant encountered a problem in that the City of Puyallup would not give appellant water for the project.[70] Appellant could not get necessary permits for the project until the water issue was cleared up.[71] Since 2004, no water certificate has been issued to Plexus.[72] Appellant never built the warehouse on Doris Mathews' property.

Appellant estimated a project cost of three million dollars.[73] Appellant hatched a plan to leverage Doris Mathews' properties as collateral for a bank loan to fund the project.[74]

Contemporaneously with his plans to develop a warehouse, appellant secured from Doris Mathews a promissory note, dated January 8, 2004, in which Doris Mathews and Mathews Investments were obligated to pay appellant one-half of all equity or monies realized in any amounts ranging from $5,000 up to $8,000,000.[75] The note purported to be secured

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[68] RP 9/04/12 p. 226.
[69] RP 9/04/12 p. 227-28; EX 31.
[70] RP 9/04/12 p. 231.
[71] *Ibid.*
[72] RP 9/05/12 p. 411.
[73] RP 9/04/12 p. 232.
[74] RP 9/04/12 p. 232.
[75] RP 9/05/12 p. 338; EX 4.

by Doris' Mathews' real property.[76] The note required Doris Mathews and Mathews Investments to make payment within 72 hours of the profit being realized, subject to a 10 percent late charge.[77] The note further provided if money cannot be realized from investment, purchases or developments, Doris Mathews and Mathews Investments will pay appellant property sales or proceeds, but if sale proceeds are not realized, appellant will be paid through refinancing Doris' Mathews' properties or by transferring the properties into appellant's possession.[78] The note recites it was given for "*Services rendered*"[79] Appellant interpreted that to include future services.[80]

On April 22, 2004 appellant and Doris Mathew executed the operating agreement for Plexus Investments, LLC.[81] Shortly prior to that date, appellant and Doris Mathews contacted a local attorney for assistance in preparing an operating agreement for Plexus.[82] The attorney had a conflict of interest, as he had previously done legal work for both parties.[83] The attorney therefore provided appellant and Doris Mathews with a template for an operating agreement and advised them to seek

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[76] *Ibid.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] RP 9/05/12 p. 357; EX 6.
[82] RP 8/30/12 p. 112.
[83] *Ibid.*

independent counsel.[84] The attorney did have a discussion with Doris Mathews regarding the uneven balance of assets contributed by the parties to the entity.[85]

The operating agreement signed by the parties differed radically from the template given to them by the attorney. Paragraph 2.6 of the template was altered in the signed document by changing "*unanimous vote*" to "*with or without unanimous vote*" to make decisions.[86] Paragraph 2.8A in the signed agreement deleted "*15 percentage aggregate sharing ratio*" from the special meetings clause in the template.[87] The phrase "*by any member*" in the template was deleted in Paragraph 2.8A of the signed agreement.[88] The signed operating agreement deleted the prohibition against s member using company property for other than company business, as set forth in the template.[89] Paragraph 4.1 of the template was silent as to a 51/49 percent ownership figure. In contrast, the signed agreement recited appellant owned 51 percent of the company, while Doris owned 49 percent.[90] The signed agreement changed Paragraph 5.2 of the template regarding liquidating distributions from net cash and other

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[84] *Id.*
[85] RP 8/30/12 p. 113-14.
[86] RP 9/5/12 p. 368; EX 6, 25.
[87] RP 9/5/12 p. 369; EX 6, 25.
[88] RP 9/5/12 p. 370; EX 6, 25.
[89] RP 9/5/12 p. 371; EX 6, 25.
[90] RP 9/5/12p. 372; EX 6, 25.

distributions to distributions shall be 50 percent to appellant and 50 percent to Doris Mathews.[91]

Appellant admitted during his years of business relationship with Doris Matthews, he did not do any accounting other than use bank records and tax returns.[92] There were no accountings done to show profits or expenses.[93] Appellant did not maintain ledger or journals for Plexus Investments.[94]

Respondents' forensic fraud examiner, Martha Prestin, testified that she could not perform an accounting of Plexus Investment's records because there were no documents available to review.[95] Ms. Prestin testified that she found several discrepancies between Plexus' bank statements and tax returns.[96] Ms. Prestin also found several unusual items in her review of the bank statements which she considered fraud indicators.[97] Ms. Prestin testified Article 10 of Plexus Investments' operating agreement contained obligated appellant, in addition to keeping a current list of federal, state and local tax returns, to provide a certified statement of the contributions of each member, to provide reports to any

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[91] RP 9/5/12 p. 376' EX 6, 25.
[92] RP 9/04/12 p. 299-300.
[93] RP 9/05/12 p. 353.
[94] RP 9/04/12 p. 300.
[95] VRP Martha Prestin 9/06/12 p. 24.
[96] VRP Martha Prestin 9/06/12 p. 25.
[97] VRP Martha Prestin 9/06/12 p. 25.

member upon request, to provide a monthly balance sheet, monthly profit and loss, and a quarterly report of the status of the company property.[98] Ms. Prestin testified none of that was done.[99]

Ms. Prestin testified it was not a good practice for the number and amounts of cash withdrawals she found in Plexus Investments' bank statements, especially if there was no supporting documentation for the withdrawals.[100] Ms. Prestin testified she has seen excessive cash use elsewhere in cases where there have been instances of fraud.[101] Ms. Prestin also testified that multiple cash withdrawals in the same day suggest a gambling addiction.[102]

Ms. Prestin testified she found several large cash withdrawals made at casinos.[103] Ms.Prestin cited a report from a Las Vegas company that corroborated several of the large casino withdrawals she observed in Plexus Investments' bank records.[104] Ms. Prestin testified it was the report that gave her knowledge it was appellant who withdrew cash from the Plexus Investments bank account at automated teller machines (ATMs) in casinos.[105]

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[98] VRP Martha Prestin 9/06/12 p. 35-36.
[99] VRP Martha Prestin 9/06/12 p. 36.
[100] VRP Martha Prestin 9/06/12 p. 36.
[101] VRP Martha Prestin 9/06/12 p. 37.
[102] VRP Martha Prestin 9/06/12 p. 39.
[103] VRP Martha Prestin 9/06/12 p. 37.
[104] VRP Martha Prestin 9/06/12 p. 37.
[105] VRP Martha Prestin 9/06/12 p. 37.

Appellant testified he made withdrawals several times from the ATM at the Emerald Queen Casino.[106] Appellant admits withdrawing Plexus Investments' money at the Red Wind Casino in Olympia.[107] Appellant admits withdrawing Plexus' cash at the Suquamish casino and the Muckleshoot casino in Auburn.[108] Appellant acknowledged withdrawing $11,000 in Plexus' cash at casinos in one month.[109]

Appellant testified that he used cash from the ATM casino withdrawals to finance the construction of his private residence. "*And I think I must have withdrawn a couple hundred and something thousand dollars building that house.*"[110] Appellant also admitted that he used Plexus money to make personal expenditures.[111]

The scale of appellant's casino withdrawals of Plexus cash is revealed in the following testimony of Ms. Prestin:

> ...[I]t appeared that they were personal expenditures made on the debit card, and casino withdrawals from the Plexus bank account totaled over $400,000. There was over 100-and-some-thousand dollars of ATM withdrawals. There were several hundred thousand dollars of

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[106] VRP 9/05/12 p. 386.
[107] VRP 9/05/12 p. 386-87.
[108] VRP 9/05/12 p. 387.
[109] VRP 9/05/12 p. 387; EX 49.
[110] VRP 9/04/12 p. 239.
[111] *Ibid.*

unidentified wires and withdrawals from the bank.[112]

Ms. Prestin also addressed the testimony offered by appellant to explain his use of Plexus money. Ms. Prestin found the financial statements supplied by appellant's witness Norma Woods unreliable.[113] Ms. Prestin testified the final balance for Plexus was not an accurate representation of total draws, due to a lack of documentation.[114] Ms. Prestin testified that Ms. Woods showed appellant's equity balance at $3,000,000, whereas it should have been $4,700,000 for each member.[115] Ms. Prestin testified the 2009 K-1 showed each party's accumulative share at $4,700,000.[116]

Notwithstanding the absence of progress on the warehouse project, appellant proceeded to encumber Doris Mathews' properties at a prodigious rate. By the time of Doris' Mathews' death in December, 2009, appellant had amassed debt on Doris Mathews' properties in the following amounts:

5818 Milwaukee Ave	$490,000.00 first deed of trust
	$ 55,000.00 second deed of trust
10915 and 10917 58th St. Ct.	$260,664.04 first deed of trust
	$ 55,000.00 second deed of trust

[112] VRP Martha Prestin 9/06/12 p. 47-48.
[113] VRP Martha Prestin 9/06/12 p. 43.
[114] VRP Martha Prestin 9/06/12 p. 47.
[115] VRP Martha Prestin 9/06/12 p. 50.
[116] *Ibid.*

11003 58th St. Ct. $325,725.46 first deed of trust[117]

Thus, by the time Doris Mathews' died, appellant had incurred $1,186,389.50 in debt on her properties with nothing to show in the way of a warehouse or other development on her property. Appellant was the recipient of much, if not all, of the money that comprised the debt.

The foregoing meets the requirements of promissory fraud. *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 396, 457 P.2d 535 (1969) ("*[I]f the promise is made without care or concern whether it will be kept, and the promisor knows or under the circumstances should know that the promisee will be induced to act or refrain from acting to his detriment, the promise will likewise support an action by the promisee.*"). *See also, Hewett v. Dole*, 69 Wash. 163, 170, 124 P. 374 (1912). Appellant knew early on it was virtually certain the warehouse project would not be developed on Doris Mathews' property, yet he continued to burden her properties with ever increasing debt, taking hundreds of thousands of dollars for himself.

The foregoing also meets the requirements of the tort of breach of fiduciary duty. As a member-manager of Plexus Investments, LLC, appellant owed Doris Mathews a fiduciary duty. *Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC*, 138 Wn. App. 443, 456-57, 158 P.3d

[117] EX 67.

1183 (2007)("*The role of members in a member-managed LLC is analogous to that of partners in a general partnership, and partners are held accountable to each other and the partnership as fiduciaries. John Morey Maurice, Operational Overview of the Washington Limited Liability Company Act*, 30 Gonz. L. Rev. 183, 200 (1995)."). Included among the member manager's fiduciary duties is the duty of loyalty. *Ibid.*

The jury was instructed on both fraud and breach of fiduciary duty. *See* Court's Instructions to the Jury Nos. 6, 10, 14.[118] The jury heard all of the foregoing evidence. The jury could entirely believe one party and disbelieve the other. *Bland*, 63 Wn. 2d Wn. 2d 155-56. Here, the jury believed respondents. The court will not disturb the jury's findings. *Ibid.*

Appellant misplaces reliance upon *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 32 P.3d 250 (2001).[119] Appellant readily acknowledges the dissimilarity in facts *Guijosa* and the facts of this case. The version of Rule 50 applied in Guijosa, 144 Wn.2d 907 differed significantly from the current version of that rule. *Guijosa* was decided in 2001. At that time, Rule 50 (a) provided that a motion for judgment as a matter of law may be made at any time before submission of the case to the jury or in accordance with CR 50(b). In 2005, Rule 50 (a) (2) underwent a significant change. The language "*or in accordance with*

[118] CP 2366, 2371, 2375.
[119] Appellant's Brief p. 34.

section b of this rule" was deleted from CR 50(a) (2). As a result, a motion for judgment for a matter of law must now first be made under CR 50(a) before submission of the case to the jury before such a motion can be made under CR 50(b) after entry of judgment. *See Gorman*, 176 Wn. App. 63 *Guijosa* involved only one motion for judgment as a matter of law made after the jury was discharged. *Guijosa* is thus both factually and legally distinguishable from this case.

Equally misplaced is appellant's reliance upon *Golle v. State Bank of Wilson Creek*, 52 Wash. 437, 100 P. 984 (1909).[120] The plaintiff in that case failed in his burden of proving the quit claim deed given to the defendant bank in that case was obtained through fraud and misrepresentation. Here, in contrast, a wealth of evidence supports the jury's verdict. *Golle* is therefore not controlling here.

McInerney v. Beck, 10 Wash. 515, 39 P. 130 (1895), relied on by appellant, is also distinguishable here.[121] Appellant relies upon *McInerney* for the proposition that a quit claim deed is as good as any other deed if the grantor had title to convey it. *McInerney* did not involve a quitclaim deed purportedly conveying title to property as a gift, such as in this case. Nor did *McInerney* involve a purported inter vivos gift to a fiduciary, such as in this case. Nor did *McInerney* involve any issue of fraud or breach of

[120] Appellant's Brief p. 36.
[121] Appellant's Brief p. 37.

fiduciary duty, such as in this case. *McInerney* is therefore factually distinguishable here.

D. The trial court did not err in denying appellant's motion for new trial.

1. Appellant waived the right to a mistrial.

Appellant argues trial court erred in denying his motion for a new trial based upon the actions of respondents' counsel in eliciting testimony of a witness regarding alleged young visitors at Appellant's home.[122] Appellant expressly waived the right to a mistrial on this ground, as indicated by the following discussion between the trial court and Appellant's counsel on September 5, 2012:

> THE COURT: Okay.
> According to my calculations, five out of the 13 jurors did believe that there was an inference raised or something crossed their mind as a result of that question. However, I'm convinced that, based on their answers, that they can and will disregard that answer and no make any inappropriate inference as to sexual orientation and/or misconduct that crossed the minds of at least five of these jurors.
>
> I want to hear from the parties as to whether or not there's any objection to continuing the trial or if any one of the parties wants to make a record for making a mistrial motion based on the responses that they heard from the jurors.
>
> MR HANSEN: ...Based upon the answers, I think it's appropriate that we go

[122] Appellant's Brief p. 38.

> forward with this jury and based upon the answers, and I think we can proceed.....
>
> ...MR. KRIKORIAN: I concur with counsel. I think the Court—I believe the answers were sufficient, at least for me to feel they're going to do their best. Obviously, it's somewhat heartening to see they listened to your instruction to disregard it. I think at this point a mistrial is just not appropriate....[123]

By declining the trial court's offer to consider a mistrial, Appellant thereby expressly waived the right to claim error in the trial court's failure to award a mistrial. *Estate of Lapping v. Group Health Cooperative of Puget Sound*, 77 Wn. App. 612, 619-21, 892 p. 2d 1116 (1995); *Sun Life Assur. Co. of Canada v. Cushman*, 22 Wn.2d 930, 943-45, 158 P.2d 101 (1945).

Appellant's attorney's statement that "*a mistrial is just not appropriate*" is more than just a waiver. It is a strong endorsement from appellant's attorney for the court to continue the trial.

Teter v. Deck, 174 Wn.2d 207, 274 P.3d 336 (2012) is not controlling here. In *Teter*, the Court, following *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000), ruled that the plaintiff, who objected regularly to repeated attempts by defendants' counsel to introduce improper evidence, and who requested curative instructions, was not required to also move for a mistrial in order

[123] RP 9/05/12 p. 24-25.

to preserve a claim of error based upon misconduct of defendants' counsel. *Teter*, 174 Wn.2d, 226. Neither *Teter* nor *Alcoa* addressed the circumstance of an express waiver on the record of the right to a mistrial. Here, the record contains express waivers by both of appellant's attorneys of the right to a mistrial.[124] Thus, neither *Teter* nor *Alcoa* control here.

In contrast, where a party declines the trial court's offer of a mistrial, Washington courts will recognize the party's waiver of the right to a mistrial. *See Estate of Lapping v. Grp. Health Co-op. of Puget Sound*, 77 Wn. App. 612, 621, 892 P.2d 1116 (1995)("*When the plaintiff declined a mistrial, however, she waived any absolute right to new trial that the misconduct might have generated...*").

As appellant's express waiver of the right to a mistrial is a matter of record, the trial court's denial of a mistrial is reviewed only for abuse of discretion. *Estate of Lapping*, 77 Wn. App., 621. *See also, Anderson v. Dobro*, 63 Wn.2d 923, 928, 389 P.2d 885 (1964); *Vern J. Oja & Associates v. Washington Park Towers, Inc.*, 15 Wn. App. 356, 363, 549 P.2d 63 (1976) *aff'd,* 89 Wn.2d 72, 569 P.2d 1141 (1977); A court abuses its discretion only when no tenable grounds exist for its decision. Hill v. Cox, 110 Wn. App. 394, 409, 41 P.3d 495 (2002).

Here, as in *Estate of Lapping*, 77 Wn. App. 612, recognizing a

[124] RP 9/05/12 p. 24-25.

waiver of the right to claim a mistrial is necessary here in order to deny appellant the benefit of gambling on the verdict. This is especially true here, as in *Estate of Lapping*, 77 Wn. App. 612, as conduct giving rise to a claim for mistrial occurred midway through the trial. *Estate of Lapping*, 77 Wn. App., 620("*Here, however, the misconduct was on November 7, and the verdict was not returned until November 19. Thus, if we were to allow the plaintiff to gamble on the verdict in this case, we would be allowing the plaintiff to squander nearly two weeks of the superior court's time.*"). Thus, having waived the right to a mistrial, Appellant's argument for a new trial has no merit.

Appellant argues, without citation to authority, the misconduct was so flagrant that no instruction or the individual jurors could have cured the prejudicial effect.[125] Arguments not supported by authority should not be considered. RAP 10.3(a) (6); *S & S Const., Inc. v. ADC Properties LLC*, 151 Wn. App. 247, 257 n. 9, 211 P.3d 415, *review denied*, 168 Wn. 2d 1002 (2010).

To the extent that it merits consideration here, appellant's argument of incurable prejudice fails for three reasons. First, as in *Estate of Lapping*, the trial court instructed the jury to disregard the offending testimony.[126] Second, in the case at bar, the length of time elapsed between the

[125] Appellant's Brief p. 40.
[126] RP 9/05/12 p. 435.

offending testimony and the jury's verdict was 12 days, the same length of time in *Estate of Lapping*, which compelled the court to reject the appellant's claim of incurable prejudice. Third, in *Estate of Lapping*, the court also recognized an effective remedy other than gambling on the verdict by assessing substantial terms in connection with the motion for mistrial. 77 Wn. App. 620-21. Here, the trial court's order of contempt ordered respondent's counsel to pay appellant's counsel $5000 in connection with the improper testimony.[127] As in *Estate of Lapping*, these three factors abated whatever prejudice appellant may have suffered as a result of the improper testimony.

Appellant argues, once again without citation to authority, the sanctions awarded by the trial court were insufficient to cure the prejudice to appellant.[128] Appellant's unsupported argument should not be considered. RAP 10.3(a) (6); *S & S Construction, Inc., v. ADC Properties, LLC,* 151 Wn. App. 257 n. 9.

Not only does appellant have to establish that the trial court abused its discretion in denying a mistrial, but he also must overcome the strong presumption that the jury verdict is correct. *Bunch v. King County Department of Youth Services,* 155 Wash.2d 179. In addition, appellant will have to overcome the presumption that the jury correctly followed the

[127] CP 2235-37.
[128] Appellant's Brief p. 38.

judge's instructions to disregard stricken evidence. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 742, 850 P.2d 559 (1993). Here, the trial court questioned each juror whether they could disregard the stricken testimony of Kathy Martin and the jurors testified that they could. [129]

In light of the foregoing, appellant has waived any claim of error in the denial of a mistrial or in the denial of appellant's motion for reconsideration. The denial of appellant's motion for a new trial was not an abuse of discretion. Appellant has also failed to overcome the presumption that the jury's verdict is correct. Appellant has also failed to overcome the presumption that the jury correctly followed the judge's instructions to disregard stricken evidence.

Appellant also argues the trial court should have granted a new trial under CR 59 (a) (7).[130] The denial of a motion under CR 59 (a) (7) is reviewed under the same standard as review of denial of a motion under CR 50. 4 Washington Practice, Rule Practice, CR 59, comment 21. Respondents therefore incorporate the arguments and authorities in paragraph 4C, above.

E. Appellant's request for attorney fees on appeal should be denied.

Appellant has failed to establish himself as the prevailing party on

[129] RP 9/05/12 p. 3-23 (Court's Questioning of Jury).
[130] Appellant's Brief p. 38-39.

appeal. Respondents incorporate the arguments and authorities in paragraphs IV B 1-6, above.

F. Respondents request an award of attorney fees on appeal in the event the Court affirms the trial court.

In the event they prevail, respondents request an award of attorney fees incurred on appeal, pursuant to RAP 18.1 and RCW 4.84.330. The trial court ruled that respondents were the prevailing party for purposes of attorney fees in the trial court, but declined to award attorney fees to respondents based upon the actions of their attorney in the trial court.[131] Respondents now have new counsel on appeal, and none of the action of their trial attorney have any bearing upon respondents' request for attorney fees on appeal.

Respondents' basis for an award of attorney fees is the attorney fee clause in the promissory note.[132] Therefore, in the event they prevail on appeal, an award of attorney fees to respondents is mandatory. RCW 4.84.330, *Singleton*, 108 Wn.2d, 730.

A party can prevail by establishing no liability exists on a contract. *Mount Hood Beverage Co. v. Constellation Brands, Inc.,* 149 Wn. 2d 121-22; *Herzog Aluminum, Inc. v. General American Window Corp.,* 39 Wn. App. 196-97; *Yuan*, 96 Wn. App. at 909-18; *Stryken*, 832 P.2d 890;

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[131] CP 1225-29.
[132] EX 4, 6.

Singleton, 108 Wn.2d, 729. Therefore, to the extent that respondents are successful in establishing no liability under the note or operating agreement, they are the prevailing parties in the appeal and are therefore entitled to an award of attorney fees.

Respondents are entitled to recover on their non-contractual affirmative defenses and counterclaims, as those defenses and claims are inextricably intertwined with respondents' defense against the promissory note. *See Mehlenbacher v. DeMont*, 103 Wn. App. 240, 247, 11 P.3d 871 (2000).

V. CONCLUSION

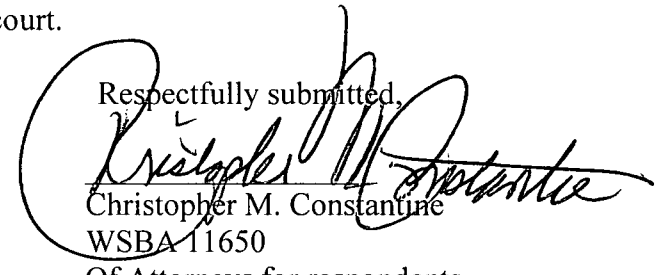
The trial court did not err in denying appellant's request for attorney's fees. Appellant did not prevail on his claim for damages breach of the promissory note. Appellant is not entitled to recover attorney fees under the Plexus Investments, LLC, Operating Agreement. The trial court did not err in finding the attorney fee clauses in the promissory note and Plexus operating agreement unenforceable. Any such error was harmless. Appellant's argument for a proportional division of attorney fees is moot. Appellant is not entitled to reasonable attorney fees under the Lodestar Method. The trial court did not err in denying appellant's motion for judgment as a matter of law. The trial court did not err in denying

appellant's motion for new trial. Appellant waived the right to a mistrial.

Appellant's request for attorney fees on appeal should be denied.

Respondents request an award of attorney fees on appeal in the event the Court affirms the trial court.

Respectfully submitted,



Christopher M. Constantine
WSBA 11650
Of Attorneys for respondents

VI. CERTIFICATE OF SERVICE

I, Christopher M. Constantine, certify under the penalty of ~~perjury~~ of the laws of the State of Washington that on June 1, 2015, I sent a copy of this document RESPONDENTS' BRIEF to the following persons and in the following manner:

Christopher J. Marston WSBA # 30571 DAVIES PEARSON, P.C. 920 Fawcett Ave Tacoma, WA 98402 Attorneys for Appellant	☑ Via U.S. Mail ☐ Via Legal Messenger ☐ Via Facsimile ☐ Via Hand Delivery ☑ Via E-mail

Dated: June 1, 2015